IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1187

THOMAS JOHN RALEY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY COMMENTS

This opposing brief is filed pursuant to the request of this Honorable Court contained in the letter of its Clerk dated April 18, 1977.

OPINION BELOW

The reported opinion of the Court of Special Appeals of Maryland, *Raley v. State,* 32 Md. App. 575, 363 A.2d 261 (decided October 11, 1976), is contained in Appendix A of Petitioner's petition. The Court of Appeals of Maryland denied Petitioner's application for writ of certiorari to the Court of Special Appeals on November 30, 1976.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Did the jury properly convict Petitioner of the use of a handgun in the commission of a felony or crime of violence where it had acquitted Petitioner of two counts of felonious offenses?

II. Did the lower court properly refuse to grant Petitioner's supplemental instructions where the substance of same had been adequately covered by the instructions actually given and the jury was not misled in any event?

III. Did the trial court's imposition of a twenty-year sentence for the common-law offense of simple assault constitute cruel and unusual punishment where there was uncontroverted evidence that Petitioner had committed some form of felonious homicide as to one victim and had seriously injured the second?

CONSTITUTIONAL PROVISIONS INVOLVED

The following federal constitutional provisions are contained in pertinent part in the petition of Petitioner:

Constitution of the United States:

Fifth Amendment.

Fourteenth Amendment.

Eighth Amendment.

MARYLAND CRIMINAL STATUTES AND MARYLAND RULES OF PROCEDURE INVOLVED

The following statutes taken from the Crimes and Punishments Article, Maryland Annotated Code, Art. 27, and Maryland Rules of Procedure are contained in Petitioner's petition:

Article 27, § 36B(d)—Handgun Law—

§ 441(e)—Definition of a crime of Violence.

§ 12—Penalty for Assault with Intent to Murder.

Maryland Rule 756(b)—Advisory Instructions to the Jury.

STATEMENT OF FACTS[1]

On March 24, 1975, Petitioner, Thomas John Raley, was indicted by the Grand Jury of Baltimore County. The four-count indictment charged that on February 17, 1975, Petitioner 1) murdered one Joseph Stephen LeFevre; 2) assaulted his wife, Linda Agnes Raley, with intent to murder her; 3) assaulted Linda Agnes Raley; and 4) unlawfully "used a handgun in the commission of a felony or a crime of violence as defined in Section 441, of Article 27, of the Annotated Code of Maryland, to wit: murder; . . . ."

The events leading to the indictment can be briefly stated: At about 4:15 A.M. on February 17, 1975, Petitioner telephoned the Baltimore County Police Department to say that two people had been shot at his home in Baltimore County. After the telephone call was received, Officer Fisher called back to the Raley residence and was told by Raley that he had shot his wife in the chest and a man in the chest. Officer Beatty was dispatched to the address given by Raley, arriving there at 4:27 A.M. Upon arrival, he saw Raley standing in the doorway with a gun in his hand. Raley told Officer Beatty, "I am the one that called you, I shot them both." Upon entering the house, the officer found the victims, LeFevre and Mrs. Raley, lying on the floor,

[1]Extracted from the reported opinion of the Maryland Court of Special Appeals.

both fully clothed. LeFevre was dead with a bullet hole in his chest. Mrs. Raley had a bullet wound in her throat but was alive and eventually recovered. Officer Glos arrived at the scene shortly after Officer Beatty arrived. Raley gave to Officer Glos two spent revolver casings and three unspent bullets. Officer Glos heard Raley say "They both came out of the kitchen" and that he "shot them both," and "They didn't belong there like that." These statements were not elicited from Raley by any questions put to him by anyone and were made in the kitchen of the home shortly after Officer Glos's arrival. A baby-sitter whom Mrs. Raley had engaged for the evening testified that Raley and his wife had been separated for about four weeks prior to February 17, 1975, but that Raley had been out with his wife and spent the night with her February 14, 1975.

Mrs. Raley was called as a witness for the State but refused to testify against her husband; Raley elected not to testify in his own defense.

On July 9, 1975, after three days of trial before a jury in the Circuit Court for Baltimore County (Judge John N. Maguire presiding), Petitioner was found guilty on Count III (assaulting his wife) and Count IV (using a handgun in the commission of a crime of violence), but was acquitted of Count I (murder of LeFevre) and Count II (assault with intent to murder his wife). On July 31, 1975, Judge Maguire sentenced Petitioner to the custody of the Division of Correction for twenty years as to Count III and for fifteen consecutive years[2] as to Count IV.

[2] Trial Counsel for Petitioner has advised Respondent that Raley's fifteen-year sentence for violation of the Handgun Law has since been reduced to five years.

ARGUMENT

THE JURY PROPERLY CONVICTED PETITIONER FOR THE USE OF A HANDGUN IN THE COMMISSION OF A FELONY OR CRIME OF VIOLENCE NOTWITHSTANDING THAT IT HAD ACQUITED HIM OF TWO COUNTS OF FELONIOUS OFFENSES; THE TRIAL COURT PROPERLY REFUSED TO GRANT PETITIONER'S SUPPLEMENTAL INSTRUCTIONS WHEN SAME WERE ADEQUATELY COVERED BY THE INSTRUCTIONS ACTUALLY GIVEN AND THE JURY WAS NOT MISLED IN ANY EVENT; AND THE TRIAL COURT'S IMPOSITION OF A TWENTY-YEAR SENTENCE DID NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT AS PROHIBITED BY THE EIGHTH AMENDMENT OF THE FEDERAL CONSTITUTION IN A CASE WHERE THE PETITIONER COMMITTED SOME FORM OF FELONIOUS HOMICIDE AS TO ONE VICTIM AND SERIOUSLY INJURED THE SECOND.

The Basis of the Conviction for Use of a Handgun in the Commission of a Felony or Crime of Violence

Ford v. State, 274 Md. 546, 337 A.2d 81 (1975), addresses the question of a verdict of guilty and an inconsistent verdict of acquittal. The Court of Special Appeals of Maryland in another decision, *Wilson v. State,* 28 Md. App. 168, 343 A.2d 537 (1975), reversed the defendant's conviction because of removal of the sole basis to support his handgun conviction. The relevant portion of the *Ford* decision is found in 274 Md. at 551:

> Nevertheless, in answering the petitioner's first contention, we think it to be plain from the language of section 36B(d) that the offense delineated in that statute is separate and distinct from the felony or crime of violence during the commission of which the handgun was used. Since this is so, an individual on trial for the handgun charge does not necessarily need to have been separately accused of the commission of a felony or crime of violence in an additional count or indictment before he can be charged with or convicted of the crime established in section 36B(d). And, when the trier of fact considers an indictment containing both a section 36B(d) handgun count and a felony

> or crime of violence count, a conviction on the former can still be sustained *even if the trier of fact returns a finding of not guilty on the latter* — in fact a finding of guilt under both, since they are not inconsistent, can each stand. [Emphasis supplied.]

Ford goes on to observe that the question of verdict inconsistency has been considered in several Maryland cases and has been rejected as forming the basis for voiding a conviction. 274 Md. at 552. Citing *Leet v. State,* 203 Md. 285, 293, 106 A.2d 789 (1953), the Court of Appeals said in *Ford,* at 552:

> While it is true that a finding of *guilt* on two inconsistent counts will be declared invalid in Maryland, *Heinze v. State,* 184 Md. 613, 617, 42 A.2d 128, 130, it does not follow that a conviction on one count may not stand because of an inconsistent acquittal on another count.

Petitioner ultimately argues that this Court should review the decision in *Ford* and reconcile the holding there with the decision in *Wilson v. State, supra.* The obvious distinction between *Ford* and *Wilson,* however, is that, as pointed out by the Court of Special Appeals in *Wilson,* the manslaughter conviction was the *sole* basis for the handgun conviction and it was reversed. In *Ford* and the instant case, on the other hand, there were acquittals on the felony charges pointing up the accepted distinction between a finding of guilt on two inconsistent counts and conviction on one count which is inconsistent with acquittal on other counts. Clearly, under *Ford v. State* the former is permissible whereas the latter is not.

Considering Petitioner's argument that there was an insufficiency of the evidence to sustain the convictions for felonious homicide, the question is not whether the issue of heat of passion was evident from the facts of the case but, rather, whether there was evidence before the jury from which it *could* properly find or infer the

requisite elements of the crimes charged. It was properly within the province of the jury to reject any or all of the evidence indicating mitigating circumstances, since it is an elementary precept that the credibility of witnesses and the weight of the evidence are matters for the trier of fact. *Lindsay v. State,* 8 Md. App. 100, 258 A.2d 760 (1969). Thus the testimony of Officer Joseph Glos indicating that when he arrived on the scene Petitioner blurted out words to the effect that Linda Raley (wife of Petitioner) and the deceased had come out of the kitchen, that he had shot both of them, and that "they didn't belong there like that," coupled with the inferences deducible from the testimony of Michael Kelly, a lifelong friend of Petitioner, that there was a probability that Petitioner had known of the intimate relationship between the deceased and his wife for some time, clearly presents a set of circumstances from which the jury could conclude that Petitioner's acts were the result of thought and deliberation sufficient to meet the test to elevate the slaying of LeFevre to felonious homicide. Thus there was clearly sufficient evidence to support a guilty verdict for felonious homicide, even though this Court need not reach that question under the rationale of *Ford v. State, supra.* It should further be remembered that Maryland cases talk in terms of "the sight of one's wife in the act of adultery," not merely the sight of one's wife and a suspected paramour exiting the kitchen of the wife's residence. *See Blake v. State,* 29 Md. App. 124 (1975). From the aforegoing, it is clear that, under *Ford,* no inquiry is to be made into the sufficiency of the evidence upon which a jury has returned a not-guilty verdict which is inconsistent with a guilty verdict; and under *Wilson v. State, supra,* the handgun conviction would fall only if the reviewing court overturned a conviction on the only felony upon which the handgun conviction could have rested. Under either of these cases, there is no infirmity as to the handgun conviction.

In sum, §36B(d), Art. 27, Maryland Annotated Code, entitled "Unlawful use of handgun in commission of crime," makes it an offense to use a handgun in the *commission* of any of the enumerated felonies and makes no mention of a *conviction* of such felonies or crimes of violence. Thus, under Maryland law, the only specific instance when the handgun conviction must be overturned is where the appellate court reverses the conviction for the only possible underlying felony or crime of violence, the likelihood being that the jury relied upon the commission of the offense as the basis and, in fact, that basis was legally infirm. Such clearly is not the case in the instant petition, as there was unquestionably the commission of the ultimate crime of violence. Finally, the doctrine of Collateral Estoppel is patently inapplicable since it may be invoked only where there are at least two separate proceedings.

The Court's Supplemental Instruction

Petitioner next claims that it was error for the lower court to fail to instruct the jury that assault was not a crime of violence and therefore not a basis for conviction under the handgun violation charged in the fourth count. Initially, the requested instruction was technically incorrect, as trial counsel for Petitioner addressed the court thusly:

> The law specifically says Involuntary Manslaughter is an exception as well Common Law Assault. It was covered in argument. I would ask that the Court indicate that Involuntary Manslaughter and Assault are *specifically* excepted from the crime of Handgun Violation. [T. 253; emphasis supplied.]

The applicable section of the Code, Sec. 36B(d) of Article 27, entitled "Unlawful use of handgun in commission of crime," provides:

> Any person who shall use a handgun in the commission of any felony or any crime of violence as defined in Sec. 441 of this article, shall be guilty of a separate misdemeanor and on conviction thereof shall, in addition to any other sentence imposed by virtue of commission of said felony or misdemeanor, be sentenced to the Maryland Division of Correction for a term of not less than five nor more than fifteen years, and it is mandatory upon the court to impose no less than the minimum sentence of five years.

Section 441(e) of Article 27 provides:

> The term *"crime of violence"* means abduction; arson; burglary, including common law and all statutory and storehouse forms of burglary offenses; housebreaking; kidnapping; manslaughter, excepting involuntary manslaughter; mayhem; murder; rape; robbery and sodomy or an attempt to commit any of the aforesaid offenses; or assault with intent to commit any other offense punishable by imprisonment for more than one year.

The law is well settled in Maryland that a trial judge is not obliged to give a requested instruction that is adequately covered in the instructions actually given, where the jury is not misled upon the subject. *Bartholomey v. State*, 220 Md. 504, 273 A.2d 164 (1960); *English v. State*, 21 Md. App. 412, 320 A.2d 66 (1974).

It is well settled that a trial judge is not obliged to give a requested instruction that is adequately covered in the instructions actually given.

The pertinent portions of the lower court's charge to the jury regarding the four offenses which would support a conviction for violation of the handgun law are as follows:

> The fourth count of the indictment charges the Defendant with the Use of a Handgun. Under our law, Article 27 section 36B, subsection d, any person who uses a handgun in the commission of any felony or crime of violence, shall be guilty of a separate misdemeanor. That is a separate crime. A handgun shall include any pistol or revolver, or

any firearm capable of being concealed on the person, and a crime of violence, of course, would include Murder, Robbery, Rape, or an attempt to commit any of those offenses. The felony alleged in this count is Murder. [T. 243]

. . . .

The fourth count of the indictment charges the Defendant with the Use of a Handgun. Under our law, Article 27, section 36B, subsection d, any person who uses a handgun in the commission of any felony or crime of violence, shall be guilty of a separate misdemeanor. That is a separate crime. A handgun shall include any pistol or revolver, or any firearm capable of being concealed on the person, and a crime of violence, of course, would include Murder, Robbery, Rape, or an attempt to commit any of these offenses. The felony charge in this count is Murder. [T. 251]

Respondent submits that the above excerpts from the jury instructions reveal that the jury was advised as to what constituted a crime of violence, and thus the requested instruction was covered, in substance, by the instructions actually given. Concomitant with the aforegoing is the long-standing principle in Maryland, that the jury is both the judge of the law and the facts in a criminal case. *Jones v. State,* 29 Md. 182 (1975). *Anderson v. State,* 12 Md. App. 186, 202 (1971). As such, it was within the jury's province to determine the legal propriety of returning a guilty verdict as to the handgun violation, notwithstanding that it had acquitted Petitioner on the companion felony charges.

Finally, as pointed out by the Court of Special Appeals of Maryland, having advised the jury of the essential elements of the handgun crime charged, it was not necessary for the trial court to advise the jury of the elements which would *not* provide a proper basis for a conviction thereon.

The Trial Court's Imposition of a Twenty-Year Sentence for Common-Law Assault.

Petitioner penultimately contends that his twenty-year sentence for common-law assault violated the prohibition against cruel and unusual punishment as proscribed by the Eighth Amendment of the United States Constitution. He relies most heavily on the decision of the Fourth Circuit Court of Appeals in *Roberts v. Collins,* 404 F. Supp. 119 (4th Cir. 1975), wherein that court, in a terse, but thorough, treatise considered the five factors which have recently shed new light on the whole question of what constitutes cruel and unusual punishment as those factors have evolved primarily from the decisions of this Court in dealing with the question of capital punishment. *Roberts* should be given no more than persuasive significance, since the decision came as the result of an appeal from the denial of habeas corpus relief; and it is therefore submitted that the decision is not controlling as to Maryland law. More significantly, the most cursory comparison of the factual circumstances in *Roberts* and the present case demonstrates glaring dissimilarities. The proceeding which resulted in Robert's 54-year sentence stemmed from a plea of guilty to common-law simple assault where the evidence revealed that Roberts had fired shots in the direction of a police officer and had clubbed a second victim. In consequence thereof, he received two consecutive twenty-year sentences for a total of forty years of his 54-year sentence in a case where he had entered a guilty plea and where, although life may have been endangered, certainly life was not sacrificed.

In contrast thereto, notwithstanding the factual and/or legal finding that Petitioner was not guilty of either murder or manslaughter of his wife's paramour, the uncontroverted evidence was that the paramour did die at his hands, and thus the trial court's sentence can in no sense be considered disproportionate to the

offense. Stated otherwise, two of the factors considered in *Roberts v. Collins, supra,* must be resolved against Petitioner, namely, the nature and gravity of the offense and the lack of arbitrariness. This is not to overlook the fact that the sentence was actually imposed on the conviction for the assault on Petitioner's wife. Respondent makes the point, however, that in other factual circumstances in which an excessively long sentence has been meted out for simple assault in Maryland, the cases have not involved the death of the victim.

Turning to the specific charge of the Eight Amendment violation, the Court of Appeals of Maryland first addressed the merits of this contention in *Roberts v. Warden,* 242 Md. 459, 219 A.2d 254 (1966), *cert. denied,* 385 U.S. 876. That court concluded that the sentences did not constitute cruel and unusual punishment. Federal courts have had occasion to address the merits of the issue on at least two occasions. In *Roberts v. Pepersack,* 190 F. Supp. 578 (1960), the United States District Court for the District of Maryland through Judge Chesnut made the following observations:

> Maryland is a so-called common law State and, as pointed out in Judge Hammond's opinion and is generally well known in Maryland law, there is no prescribed statutory provision with regard to the extent of fine or fine and imprisonment for cases of assault and battery. In practice, punishment in such cases is necessarily left to the judicial discretion of the trial Judge, dependent upon the facts and circumstances of each particular case. At most it must be admitted that only very unusual circumstances would justify such a length of imprisonment in cases of assault and battery; but on the facts of the petition here presented and in the absence of hearing the particular facts and circumstances of the case, it is not proper for this federal court to assume that the sentence was so severe as to constitute cruel and unusual punishment under Maryland criminal law. And it will

> appear from Judge Hammond's opinion that the Court had before it a transcript of the record of the case including, I assume, what the facts and circumstances were; and I assume further that this transcript was also known to or available to the Court of Appeals in the two subsequent cases.
>
> * * * * * *
>
> It is at least entirely inferable from all these circumstances which presumably were brought before the trial judge, the latter may have reasonably concluded that the defendant's conduct constituted a highly outrageous attempt to seriously wound the police officers in the discharge of their duty. Therefore, in the light of what appears in this petition and what appears in the opinions of the Maryland Court of Appeals, I would not feel justified in deciding on a petition for release of the defendant on habeas corpus that the sentence imposed was necessarily cruel and unusual punishment as a matter of law. [190 F. Supp. at 581-582.]

More recently, in 1967, the Fourth Circuit Court of Appeals, in an unreported memorandum decision filed in *Roberts v. Warden,* No. 11,201 (filed October 31, 1967), stated:

> [I]n Roberts' most recent case, the Maryland court faced the issue on the merits and, interpreting the intent of the Maryland legislature, held that the sentence was not excessive.
>
> We find no federal question involved in Roberts' case. It is clear that Roberts' sentence, held by the Maryland Court of Appeals to be authorized by state law, is not within our power to review. *See Stevens v. Warden,* ___ F.2d ___ (No. 10,005 4th Cir. 1967). Moreover, while we may find disconcerting the specific result — that simple assault in Maryland may carry a greater punishment than assault with intent to murder — the Maryland interpretation of its own law is binding upon us. The pronouncement of unconstitutionality of state law by federal courts must be predicated upon a more substantial basis than a mere feeling that the

> law appears incongruous. Since we discover no greater objection in the present case, Roberts' appeal must be dismissed.

In Maryland, assault and battery are common-law crimes for which no statutory punishment is prescribed. *Gleaton v. State,* 235 Md. 271, 201 A.2d 353 (1964); *Weddle v. State,* 4 Md. App. 85, 241 A.2d 414 (1968); *Glass v. State,* 24 Md. App. 76, 329 A.2d 109 (1974). The Maryland courts have long held that any sentence within the limits prescribed by law is valid and does not constitute cruel and unusual punishment in violation of any constitutional protections unless dictated by passion, prejudice, ill will or any other unworthy motive. *Glass v. State, supra.* There is no statutory limitation on the penalty which may be imposed for simple assault and there was none at common law. *Heath v. State,* 198 Md. 455, 85 A.2d 43 (1951); *Apple v. State,* 190 Md. 661, 59 A.2d 509 (1948). Therefore, a trial judge in Maryland generally has wide discretion in determining what sentence to impose; and in making that determination, he may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come. *United States v. Tucker,* 404 U.S. 443; *Towers v. Director,* 16 Md. App. 678, 299 A.2d 461 (1973). Thus, the law in Maryland is that a sentence for a common-law crime for which no sentence is fixed by statute is not invalid unless it amounts to cruel and unusual punishment or is imposed in violation of due process of law. *Glass v. State, supra.* So the Court of Appeals said when discussing sentences for simple assault in *Gleaton v. State, supra* at 277:

> Nor do we construe the penal limits imposable for the statutory assaults as implying a legislative policy to confine sentences for common law assault to not more than those prescribed for the statutory assaults. Statutes in derogation of the common law are strictly construed, and it is not to be presumed

> that the legislature by creating statutory assaults intended to make any alteration in the common law other than what has been specified and plainly pronounced. *Dwarris on Statutes,* 695. The matter of imposing sentences is left to the sound discretion of the trial court, and the restraint on its power to fix a penalty is the constitutional prohibitions against cruel and unusual penalties and punishment found in Articles 16 and 25 of the Maryland Declaration of Rights. See *Mitchell v. State,* 82 Md. 527, 534, 34 A. 246 (1896); *Von den Bosch v. Swenson,* 194 Md. 715, 716, 70 A.2d 599 (1950); *Casey v. Warden,* 198 Md. 645, 647, 80 A.2d 896 (1951).

At the outset, two basic premises of law should be considered: Ordinarily, federal courts should not inquire into a sentence which is within the limits of state law except in the most exceptional circumstances. See *Gowen v. Wilkerson,* 364 F. Supp. 1043 (D. Va. 1973). The second precept is found in *LaReau v. MacDougall,* 473 F.2d 974 (2nd Cir. 1972), where it was said that the "cruel and unusual punishment clause does not forbid all excessive or severe penalties."

Maryland's common-law assault is unique, and has been upheld uniformly in the Maryland courts. In *United States v. Schultheis,* 486 F.2d 1331 (4th Cir. 1973), there appears a discussion of Maryland's offense of simple assault. The Fourth Circuit Court of Appeals cited with approval *Gleaton v. State, supra,* which is one of the leading Maryland cases on simple assault. That court quoted at length from *Gleaton,* where it was recognized that the penal limits impossible for statutory assaults did not confine sentences for common-law assault. It is submitted that the flexible sentencing possibilities for simple assault in Maryland have not been eroded through legislatively imposed penalties for certain assaults. It is conceded that this flexibility and the imposition of a sentence is subject to federal as well

as state constitutional prohibitions against cruel and unusual punishment; however, in this case it clearly passes constitutional muster.

Varying tests have been used in the determination whether punishment is cruel and unusual. All of these tests, however, seem to ask whether under all of the circumstances the punishment in question is "of such character or consequences to shock general conscience or to be intolerable in fundamental fairness." See *Lee v. Tahash,* 352 F.2d 970 (8th Cir. 1965), and *Church v. Hegstrom,* 416 F.2d 449 (2nd Cir. 1969). Underlying the Eighth Amendment prohibition against cruel and unusual punishment is the basic concept of "the dignity of man." *Trop v. Dulles,* 356 U.S. 86 (1958). The Court added in *Trop* at 101:

> "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In addition to the above test, this Court in *Weems v. United States,* 217 U.S. 349 (1910), recognized the possibility that "punishment in the State prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." *Accord, Ralph v. Warden,* 438 F.2d 786 (4th Cir. 1970). Although the standard applicable under the Eighth Amendment is one "not susceptible to precise definition" there are several objective factors which are useful in determining whether the sentence is constitutionally disproportionate. *Furman v. Georgia,* 408 U.S. 238 (1972). Mr. Justice Brennan, in his concurring opinion in *Furman,* stated that the test to be used is a cumulative one focusing on an analysis of the combined factors.

> The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it was inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more efficiently than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhumane and uncivilized punishment upon those convicted of crimes. [408 U.S. at 282.]

Another test was propounded by the Fourth Circuit Court of Appeals in *Hart v. Coiner, supra.* In that case the issue involved a West Virginia recidivist statute and its application to relatively insignificant crimes. The elements which determine cruel and unusual punishment were said to be: (1) The nature of the offense itself; (2) the legislative purpose; (3) the punishment in other jurisdictions of the same crime; (4) the punishment in the same jurisdiction for like offenses. The main gist of the test set forth by the aforegoing decision is an attempt to determine whether or not the sentence is so disproportionate to the seriousness of the *offense* and so grossly excessive that it amounts to cruel and unusual punishment.

As noted by the Court of Appeals in *Gleaton v. State, supra,* the sentencing judge was not precluded from imposing the sentence in excess of that which could be imposed for statutory assaults, and it is submitted that this Court should give approval to that interpretation of Maryland law. This Court should solely confine itself to the facts in the instant case and assign great weight to the nature and gravity of the offense as applied to the case's unique factual situation.

As to other Maryland cases involving a twenty-year conviction for assault, in *Adair v. State,* 231 Md. 255, 189 A.2d 618 (1962), and *Wilkens v. State,* 5 Md. App. 8, 245 A.2d 80 (1967), the Court of Special Appeals of Maryland upheld twenty-year sentences for assault and battery; and in *Johnson v. State,* 2 Md. App. 235, 234 A.2d 167 (1967), the defendant was sentenced to twenty

years for assault with intent to rape and twenty years for assault and battery. On appeal, however, the twenty-year sentence for assault and battery was vacated, not because it constituted cruel and unusual punishment but because the doctrine of merger operated to combine the lesser assault charge with the greater. In Maryland, statutory assault must be construed in derogation of the common-law assault and must be strictly construed. As pointed out in *United States v. Schultheis, supra,* it does little good to cite cases involving cruel and unusual punishment because each case must be determined on its own facts.

The next element to be considered is whether the punishment when measured by certain objective factors is "unacceptable to contemporary society". Two important Eighth Amendment cases touched on this area: In *Weems v. United States, supra,* this Court said that the proscription of cruel and unusual punishment did not remain obsolete but could acquire meaning as public opinion became enlightened by humane justice. In *Trop v. Dulles, supra,* the Court stated that "the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In that regard we can see that the present standards are of no consequence to Raley. The Maryland General Assembly, by enacting Chapter 858, Acts 1975, increased the maximum penalty contained in Article 27, Section 12, Annotated Code of Maryland, for assault with intent to murder from 15 to 30 years. It would therefore appear by current standards that a 20-year sentence for simple assault arising out of the circumstances in the instant case would be even less removed from the realm of cruel and unusual punishment. Mr. Justice Stewart, in his concurring opinion in *Furman,* stated that "both in constitutional contemplation and in fact, it is the legislature, not the court, which responds to public opinion and immediately

reflects the society's standards of decency." In light of this recent statutory change, it could hardly be said that the sentence imposed in Raley's case was so severe as to shock the conscience of the public.

Finally, there is the element of whether the punishment is excessive in that it serves no penal purpose more effectively than a less severe punishment. Respondent does not assert that the record demonstrates any proclivity on the part of Raley to commit crime. However, the severity of the present offense, considered in conjunction with the other factors, Respondent submits, sufficiently justifies the sentence imposed and does not warrant the intervention of this Court.

It is important to remember that the determination that a given sentence trangresses the limits of cruel and unusual punishment depends upon the facts of the particular case. *United States v. Schultheis, supra,* Maryland is a common law state and not all of its crimes have been made into statutory offenses. In fact, as previously noted, statutes in derogation of the common law are strictly construed and it cannot be presumed that the legislature intended to make any alteration in the common law. Likewise, the comparison factor of the maximum penalty for simple assault in Maryland against the maximum in other states is unimportant. In *Hart v. Coiner* there was a mandatory life sentence and in the factual situation in that case even for crimes of little significance. As for the comparison of the sentences with other maximum sentences in the State for comparable crimes, it is submitted that this in and of itself does not justify a *per se* application of the constitutional protections against cruel and unusual punishment.

In conclusion, Respondent submits that whatever the jury's reasons for choosing to ignore the obvious commission of a felonious homicide by Petitioner as

well as a second assault which endangered the life of Petitioner's wife, the trial judge was not obliged to put blinders on and totally disregard the nature and gravity of the offense. Such a consideration clearly comports with two of the five factors in determining whether or not a sentence is cruel and unusual punishment as prohibited by the Eighth Amendment of the United States Constitution. In no sense can the sentence imposed be considered either arbitrary or disproportionate to the offenses.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of May, I served a copy of the Brief in Opposition to Petition for Writ of Certiorari in the above entitled case, by depositing same in the United States mail, postage prepaid, to attorneys for Petitioner:

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